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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

**No. 463**

LYDON WEBBER, JOHN MARTINSON, JOHN P. MURPHY, JOSEPH O'DONNELL, JULIO F. PACHECO, J. DAMSTEDT, JOSEPH NESSMAR, K. VALCHOS, ROBERT C. MISCIONE, SOREN LASSEN, EDWARD MARSH, RICHARD THOMPSON, GRADY WATSON, GERALD E. PETTIPAS, MARVIN PHILLIPS, JOHN BOLING, ZYGMUNT W. OSINSKI, RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, ROBERT MATTHEWS, and LINDSEY J. WILLIAMS, as Trustees of the Seafarers Welfare Plan, and RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, E. B. McAULEY and AL TANNER, as Trustees of the Seafarers Vacation Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, KENNETH J. WRIGHT, RALPH E. CASEY, WILLIAM G. MULLINS, JOSEPH S. KISS, W. H. MILLS, C. J. BRACCO and JAMES TIERNEY, as Trustees of the Radio Officers Union Pension and Welfare Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, WILLIAM G. MULLINS, JOSEPH S. KISS and W. H. MILLS, as Trustees of the Radio Officers Union Vacation Plan; ROBERT C. FRAVEL, AHMED MEHSSIN; and MAX HARRISON and PRICE C. SPIVEY, as Trustees of the Maritime Advancement Programs,

*Petitioners,*

*and*

MARITIME FOOD CORPORATION,

*Petitioner,*

*against*

TURNER & BLANCHARD, INC., *et al.*,

*Respondents.*

## BRIEF FOR RESPONDENT, GOVERNMENT OF PAKISTAN, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Petitioners,

*and*

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*against*

TURNER & BLANCHARD, INC., *et al.*,

Respondents.

## BRIEF FOR RESPONDENT, GOVERNMENT OF PAKISTAN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

### Question Presented.

Where a district court found that the discharge of cargo from an attached vessel was an essential preliminary to the sale of such vessel by the marshal and ordered him to con-

tract for such discharge as an adminstrative expense to be repaid out of the proceeds of sale of the vessel prior to the distribution of the balance of such proceeds among attaching lienors, was such order, in the circumstances, an abuse of discretion?

## Statement.

The cargo loaded by the SS. *Emilia*, as a common carrier in international trade, included property of this respondent and well over 200 other shipments deliverable at the Azores, Izmir, Iskanderun, Beyreuth, Port Said, Port Sudan, Massawa, Karachi and Bombay.

The subsequent facts are as set forth in the brief submitted in behalf of the United States and the United States Marshal. Except as so stated, this respondent rejects the statement of facts given in the brief of Petitioners Webber, *et al.* In a case that turns on facts and on equitable principles, some specific corrections seem to be in order.

*A.* Petitioners Webber, *et al.*, do not advise the court of their true interest, or lack of it, in the subject matter. There are nineteen petitioning seamen, of whom 17 were libellants for unpaid wages and two for maintenance and cure. Respondent's proctor has just learned that the records of the owners, A. H. Bull S. S. Co., bolstered by signed receipts, show that the wages of all of these men *have been paid in full*, with the possible exception of one, John Boling, a radio operator. The records show payment to Boling of the $763.22 balance which was due him, but his receipt was not produced. It also appears that while the seamen's wages accruing prior to the seizure of the vessel were paid directly by the owners, those rendered thereafter were paid indirectly out of owners' funds. Prior thereto the owners had established a bank letter of credit to assure payment of

wages, by request of the Seafarers' International Union, which feared a collapse of the Bull Lines and other Kulukundis companies. Final payment of wages was accomplished through a union drawing on said bank credit. It further appears that Boling, without the marshal's agreement was held by the owners on stand-by hire while the vessel was *in custodia legis* and thus had no liens for said balance in any event.

Of the two remaining seamen, petitioner Ahmed Mehsin, appears to have worked January 10-31, 1963, while the vessel was in custody, and has a non-lien claim for $500 for maintenance and cure. Petitioner Richard C. Fravel claims $336 for maintenance and cure, $149.76 for unearned wages and $16.61 for transportation which, on proof, would constitute liens.

The remainder of these petitioners claim as trustees of union funds, which would make them general creditors not possessing liens against the vessel. *Brandon* v. *SS. Denton*, 1962, C. A. (5th), 302 F. (2d) 404.

2. To complete the factual picture with respect to seamen, or persons who may be seamen, but are not petitioners herein, the records indicate that eight personal injury libels were filed, of which four are covered by, and defended by, insurers. The remaining four suits, defended by the owners, were appraised for reserve purposes at a total of $12,000, assuming that all four prove negligence and sustain their causes of action.

3. Petitioners Webber, *et al.*, in their statement and argument, aver that the amount *claimed* by Turner & Blanchard, Inc. for wharfage would exhaust the fund (Pet.

15, 27), without noting that such wharfage was not contracted for by the marshal with or without court sanction, and is subject to proof of reasonable value. For example, comparable published rates at Port of New York Authority piers in the same area (P. N. Y. A. Schedule No. 7) are $75 *per diem* for an inactive vessel such as the *Emilia*. Any reasonable award to Turner, even at double those rates, would be paid in full, leaving an ample residue for unpaid seamen, if any, as well as the maintenance and personal injury cases not otherwise disposed of. Incidentally, under Rule 26 of the District Court for the Eastern District of New York, wharfage claims are not includible in the Marshal's bill of costs where the amount still has to be established, but are handled by a separate procedure, whereas the discharging stevedore's claim was fixed in amount by contract sanctioned by the court after competitive bidding.

4. Petitioners; Webber, *et al.*, do not fully advise the Court on the subject of delay. The paramount union objective was reorganization of the Kulukundis companies, an understandable objective in that various union funds were the largest unsecured creditors of such companies and that union jobs could be preserved by reactivating the vessels. In pursuit of that objective said petitioners' position was to oppose removal of outbound cargo and sales of vessels. It may be noted that as late as May 20, when Marine Tobacco Co. Inc. obtained an order (Pet. App. 40a, 41a) for removal of its merchandise from the *Emilia* at its own expense, involving the work of one man with a waiting truck, the order was granted over the opposition of said petitioners, who wanted to preserve the *status quo*.

5. Said petitioners' statement that Judge Thomas F. Croake enjoined the sale of the S.S. *Emilia* (Pet., 9, 10) is

inaccurate. It is true that he took the matter under advisement as requested by the owners and the unions, and conferred with Judge Mishler, but he excluded from his general injunction the SS. *Emilia*, sale of which was simultaneously postponed to June 4, 1963 by Judge Mishler to afford to petitioners and owners the further time and opportunities they were seeking.

6. The hearings before Judge Rosling (Pet. 5-7), which were conducted in the framework of the mortgagee's foreclosure proceeding, were never completed, but adjourned *sine die* and aborted through the failure of any party to ask for their reconvention. In the course thereof, Judge Rosling remarked from the bench that a cargo-owner had a legal right to re-claim his cargo despite the pleas of the owners, supported by the petitioners and others, that the Court should preserve the *status quo* pending possible reorganization of the company. These proceedings, however, became moot and are irrelevant.

7. The United States, Government of Pakistan and Caltex (India) Ltd. did not own a "substantial majority" of the cargo as petitioners Webber, *et al.*, assume (Pet. 4), but about 3,500 tons out of 8,800. However, petitioners' error may arise from the fact that the Department of Agriculture had a regulatory duty to inspect about 2,800 tons of wheat owned by others for deterioration due to delay and such wheat was sometimes erroneously referred to as United States cargo.

8. None of said three cargo-owners could get at and remove his cargo, all or part of which was buried in the ship, for a multitude of practical reasons, and it is unfair and misleading to imply that in this case there could have

been anything other than a total discharge of cargo in one operation.

9. In their respective statements neither petitioners nor respondent Turner & Blanchard, Inc. attempt to assert as a fact that the district court or the marshal could have found stevedores and other personnel willing to remove the cargo and look thereto for payment of their charges. Yet, in their arguments, both assume this to be a fact (Pet. 28; Turner, 4), which is unwarranted in the case at bar, whatever may have been the circumstances in another and different case. Here there is no showing of any such offer by Turner & Blanchard, Inc., which is in the stevedoring business, nor by any of its fellow stevedores, nor is there any showing that union labor to man the vessel during her removal and discharge would work on any such speculation. The problem of finding money to preserve, discharge and sell the *Emilia* is ignored, except for the glib assumption in argument that the court did, after all, have some realistic alternative. In actuality, no way of raising funds for any such purpose, even to pump the bilges, was ever found except by assurance of payment out of the vessel's sale proceeds.

# ARGUMENT.

## I.

**The principles of law applicable to this case have already been promulgated by this court and no conflicts exist. The challenge is to a factual matter involved in the exercise of the district court's discretion, which proposed exercise of discretion was reviewed and affirmed by the Court of Appeals for the Second Circuit before it was carried out. It is apparent that factual situations of general similarity seldom arise, that the specific facts in each such case are apt to be unique and that the facts before us are unique. No general significance can be attached to a review of this case.**

When lienors attach a vessel, demanding its sale, it is the first duty of the court to achieve such sale. The court has all the necessary discretion to authorize and direct the marshal to incur such expenses as it may find necessary in a particular case to accomplish the sale. The expenses so authorized are to be paid first out of the sale proceeds. The balance, if any, is to be distributed to the attaching lienors in accordance with the rank and priority of their liens. These principles are settled. *New York Dock Company* v. *SS. Poznan*, 274 U. S. 117.

In the circumstances of our case, where it was found that the vessel could not be sold without prior discharge of cargo in one operation at the expense of the fund to be generated by the sale, the district court's discretion was so exercised. Significantly, the petitioners confined their appeal to the Court of Appeals from the district court order of May 21, 1963 (Pet. App., 14a; 15a) solely to that portion which decreed that the cost of unloading the vessel should be a marshal's expense to be paid out of the proceeds of

sale. They did not appeal from, and thus recognized the necessity of, provisions that the vessel be sold free of cargo at an upset price, that the marshal contract for the moving, unloading, etc., and that the costs of moving the vessel, insurance and wharfage charges to the date of delivery to a purchaser should be marshal's expenses (Pet. 4).

As for Turner & Blanchard, Inc., the wharfinger who has filed a brief supporting the plea for certiorari, it did not appeal from said district court order at all. It joined in the motion of cargo respondents for an early hearing of said appeal on numerous emergency grounds, although it now, in argument, purports to deprecate the emergency (Turner, 4).

The Court of Appeals, in due course, affirmed the district court's application of the same principle to the expense of physically unloading the cargo as was applied to the accessory expenses incidental to the unloading. Petitioners are unable to cite a single holding that a distinction must be made and a different principle applied. In the absence thereof, they append a few consent orders of district courts wherein discharge costs were met by cargo owners. Voluntary actions induced by economic considerations outside the field of law underlie such consent orders.

In *The St. Paul*, 271 F. 265 (1921, 2nd C. C. A.), the sole reported case relied on by the petitioners, cargo discharge had likewise been dealt with by consent order and was never an issue. While the vessel was in custody of the marshal, she underwent fire, sinking and raising at her anchorage, with the cargo already injured and liable to further depreciation. Into this emergency situation stepped one Hudson Navigation Company, which offered to take the vessel to its pier and discharge her and look to the cargo-owners for payment of the cost of discharge. The district court granted a consent order authorizing the

marshal to permit this to be done. Hudson also attempted to acquire the vessel at a sale which was held while its delayed unloading was still in progress, on a bid so low that the district court refused confirmation of the sale and was upheld therein by the Court of Appeals. Obviously, Hudson had interests and motivations beyond those of a stevedore. After discharge of cargo the vessel brought a fair price on a resale. *The St. Paul* was brought to the attention of the Court of Appeals for the same circuit on the appeal in the case at bar.

Petitioners also cite and append the opinion in *The Orion* (Pet. App. 37a-39a) an English case entirely distinguishable on its facts. Cargo-owners entered a salvage claim for the cost of their voluntary discharge of cargo from a vessel which had stranded in the Thames. The Court found that there was no danger to the vessel by retention of the cargo nor any benefit to the ship from its discharge.

It is painfully obvious that petitioners' point that the lower courts' determination would overturn established law is without substance or foundation.

## II.

**Petitioners profess to find in *Poznan* a "test" concerning "benefit of the lienors" which would violate common sense as well as the court's own language, the clear meaning of which is benefit to the *res* in the liquidation thereof to create a fund.**

Petitioners profess the "test" to be "whether the act would benefit all of the claimants interested in the fund created from the sale of the vessel, in order to hold the cost of discharging the cargo as an administrative expense" (Pet. 18). This would recognize that the cost of discharge

was, like the wharfage, an administrative expense in the *Poznan* context, but would assert that it can never be such in a case where there are lienors other than cargo-owners, or where all claimants cannot be paid in full.

Let us first examine this "test" from a common sense viewpoint. Being a "test", and therefore immutable, it would rule out any case in which there were one other lienor, such as a seaman, among the cargo-owners, regardless of whether or not the seaman would be paid. Were the lienors a mixed group, some of whom would be paid and some not paid, the court would be helpless to get the cargo discharged by promising payment therefor out of the sale proceeds, regardless of the many hypothetical situations in which there would be no other way out. The powers of the court would be limited firstly by the condition and market value of the vessel it received for liquidation and, were it a hulk, the court would seem to have no recourse but to refuse to accept the case. The court's powers would be limited, secondly, by the nature and amount of the liens, so that proofs of claims could not, as now, await the creation of a fund, for there might be a species of libellant who did not have a lien or who was paid off subsequent to filing his libel.

One must then inquire whether this "test" is met if all libellants are cargo-owners but some have priority over others because they have tort claims (cf. *The Henry W. Breyer*, D. C. Md. 1927, 17 F. 2d 423; *The City of Athens*, D. C. Md. 1949, 83 F. Supp. 67) and thus some do not get to participate in the fund. If all libellants are cargo-owners and the sale yields no residual fund after administrative expenses, would the "test" be met because the cargo-owners receive collateral "benefit" from having their cargo discharged? Some may not, where cargo has spoiled or has lost its market and is not worth reshipment or handling charges.

More importantly, however, if *Poznan* turns on collateral benefit to cargo owners, why did not the court just say so and let the case rest on implied contract or unjust enrichment? Instead, the Court clearly explained its own rationale. It took the view that the case was one of liquidation of a *res*, presenting similar problems in an admiralty court or any equity court, and it proceeded to review the governing principles. As for administrative expenses (274 U. S. 117, 121):

> "* * * They result rather from the self-imposed duty of the court, in the exercise of its accustomed jurisdiction, to require that expenses which have contributed to the preservation or creation of the fund in its custody should be paid before a general distribution among those entitled to receive it."

The lienors are, of course, the ones who will ultimately benefit if and when a fund can be created. But at the time the service is rendered the benefit thereof is not tied to lienors at all, but to the property in custody, as the court states (274 U. S. 117, 122):

> "It is enough if the court approves the service rendered or permits it to be rendered, and it inures to the benefit of the property or funds in its custody."

It therefore appears that the petitioners' real quarrel is not, and cannot logically be, with the Court of Appeals which followed *Poznan*, but with *Poznan* itself. What they ask is, in essence, that this court should re-visit and repudiate *Poznan*. They, after all, are the ones who seek to overturn settled law.

## III.

**Those who seek or endorse certiorari cannot even show any individual harm.**

With respect to petitioners, Webber, *et al.*, it now appears that the issue is moot (pp. 2, 3, *supra*). With respect to Turner and Blanchard, Inc., its claim, when proved by applicable standards, will be paid in full (pp. 3, 4, *supra*). With respect to Maritime Food Corporation, which has joined as a petitioner, its claim is behind the Mortgage, whereat, in any event, all distribution stops. As a practical matter, the issue is moot as to said petitioner also.

## Conclusion.

**For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.**

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October 1, 1963

## Certification of Service.

This is to certify that on the 7th day of October, 1963 I served true and correct copies of the foregoing brief by first class mail upon counsel for the respective parties hereto, as follows:

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